Supreme Court, U.S.
FILED
DEC 26 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-225

IN THE

Supreme Court of the United States

OCTOBER TERM 1985

MARGARET M. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES, et al.,

Petitioners

v.

MICHIGAN ACADEMY OF FAMILY PHYSICIANS, et al.,

Respondents

On Writ of Certiorari to the United States Court of Appeals For the Sixth Circuit

BRIEF AMICUS CURIAE OF THE AMERICAN MEDICAL ASSOCIATION IN SUPPORT OF RESPONDENTS

Of Counsel:
KIRK B. JOHNSON
B. J. ANDERSON
American Medical Association
535 N. Dearborn Street
Chicago, Illinois 60610
(312) 645-5000

JACK R. BIERIG*
DAVID F. GRAHAM
One First National Plaza
Chicago, Illinois 60603
(312) 853-7000

SIDLEY & AUSTIN
Counsel for Amicus Curiae
*Counsel of Record

BEST AVAILABLE COPY

QUESTIONS PRESENTED

Amicus American Medical Association will address the following issues:

1. Whether 42 U.S.C. §1395ff or 42 U.S.C. §405(h), to the extent incorporated in 42 U.S.C. §1395ii, bars federal jurisdiction under 28 U.S.C. §1331 of a general challenge to the statutory and constitutional authority of the Secretary of Health and Human Services to promulgate a regulation, when no other basis for judicial review of the lawfulness of that regulation exists.

2. Whether judicial review of the question whether the Secretary of Health and Human Services has promulgated a regulation which exceeds the scope of his delegated authority is constitutionally required to satisfy the demands of due process and maintain the constitutional scheme of separation of powers.

TABLE OF CONTENTS

PAGE

INTEREST OF *AMICUS CURIAE* 1

STATEMENT OF THE CASE 1

SUMMARY OF ARGUMENT 3

ARGUMENT 5

I. THE MEDICARE ACT DOES NOT FORECLOSE JUDICIAL CONSIDERATION OF RESPONDENTS' CHALLENGE TO THE SECRETARY'S STATUTORY AND CONSTITUTIONAL AUTHORITY TO PROMULGATE A REGULATION UNDER PART B OF MEDICARE..... 5

A. Jurisdiction Is Not Impliedly Precluded By 42 U.S.C. §1395ff 6

1. This Court's Decision In The *Erika* Case Does Not Support Implied Preclusion Under §1395ff 6

2. The Government's Attempt To Expand The Preclusive Effect Of §1395ff Is Without Merit 10

B. Jurisdiction Is Not Explicitly Precluded By 42 U.S.C. §405(h) As Made Applicable To Medicare By 42 U.S.C. §1395ii 12

1. The Second Sentence Of §405(h) Does Not Bar Jurisdiction Here 12

2. The Third Sentence Of 405(h) Does Not Bar Jurisdiction Here 14

PAGE

II. JUDICIAL REVIEW OF RESPONDENTS' CHALLENGE TO THE SECRETARY'S REGULATION IS REQUIRED BY THE CONSTITUTION 19

A. Due Process Requires Judicial Review Of Respondents' Challenge To The Secretary's Regulation 20

B. The Constitutional Scheme Of Separation Of Powers Requires Judicial Review Of Respondents' Challenge To The Secretary's Regulation 23

CONCLUSION 26

Appendix A-1

TABLE OF AUTHORITIES

PAGE

Cases

Abbott Laboratories v. *Gardner*, 387 U.S. 136 (1967) 6

American Power & Light Co. v. *SEC*, 329 U.S. 90 (1946) 24

Barlow v. *Collins*, 397 U.S. 159 (1970) 21

Bio-Medical Applications of Providence, Inc. v. *Heckler*, 593 F.Supp. 1233 (D.D.C. 1984) 15

Califano v. *Sanders*, 430 U.S. 99 (1977) 22

College of American Pathologists v. *Heckler*, 734 F.2d 859 (D.C. Cir. 1984) 8-9, 11

Colonial Penn. Ins. Co. v. *Heckler*, 721 F.2d 431 (3d Cir. 1983) 13, 15

Crowell v. *Benson*, 285 U.S. 22 (1932)..... 20

Doe v. *Bolton*, 410 U.S. 179, *reh. denied* 410 U.S. 959 (1973) 21

Dunlop v. *Bachowski*, 421 U.S. 560 (1975) 6

Erika, Inc. v. *United States*, 634 F.2d 580 (Ct. Cl. 1980) *rev'd.*, 456 U.S. 201 (1982)..... 8

Hatcher v. *Heckler*, 772 F.2d 427 (8th Cir. 1985). 8

Heckler v. *Ringer*, 466 U.S. 602 (1984)..... 3, 9, 14-19

Immigration & Naturalization Service v. *Chadha*, 462 U.S. 919 (1983)..... 24

Industrial Union Dept. v. *American Petroleum Institute*, 448 U.S. 607 (1980) 24

	PAGE
Johnson v. *Robison*, 415 U.S. 361 (1974)	6, 23
Leedom v. *Kyne*, 358 U.S. 184 (1958)	6, 24
Lindahl v. *Office of Personnel Management*, 105 S. Ct. 1620, 53 U.S.L.W. 4371 (1985)	16
Mathews v. *Eldridge*, 424 U.S. 319 (1976)	5, 15, 17, 21
NLRB v. *Bell Aerospace Co.*, 416 U.S. 267 (1974).	22
National Assn. of Home Health Agencies v. *Schweiker*, 690 F.2d 932 (D.C. Cir. 1982), *cert. denied*, 459 U.S. 1205 (1983)	18, 22
National Assn. of Patients on Hemodialysis & Transplantation, Inc. v. *Heckler*, 588 F.Supp. 1108 (D.D.C. 1984)	8-9, 13, 15
Northern Pipeline Constr. Co. v. *Marathon Pipe Line Co.*, 458 U.S. 50 (1982).....	6, 20
St. Louis University v. *Blue Cross Hospital Service*, 537 F.2d 283 (8th Cir.) *cert. denied*, 429 U.S. 977 (1976)	18
Schechter Poultry Corp. v. *United States*, 295 U.S. 495 (1935)	24
Schweiker v. *McClure*, 456 U.S. 188 (1982)	4, 11, 17, 20-22
Skidmore v. *Swift & Co.*, 323 U.S. 134 (1944)...	22
United States v. *Erika, Inc.*, 456 U.S. 201 (1982).	3, 6-11, 20
Wayne State Univ. v. *Cleland*, 590 F.2d 627 (6th Cir. 1978)	22
Weinberger v. *Salfi*, 422 U.S. 749, 762 (1975) ...	6, 14, 17-20
Yakus v. *United States*. 321 U.S. 414 (1944)	24

Statutes and Regulations

	PAGE
28 U.S.C. § 1331	passim
42 U.S.C. § 405(g)	14
42 U.S.C. § 405(h)	2-5, 12-20, 23, 25
42 U.S.C. § 1395a	21
42 U.S.C. § 1395u(b)(3)	2, 13
42 U.S.C. § 1395ff	2-6, 8-12, 20, 23, 25
42 U.S.C. § 1395ii	4, 12, 14, 18-19
42 U.S.C. § 1395ww(d)(7)(B)	12
20 C.F.R. § 405.502	8
42 C.F.R. § 405.504	passim

Miscellaneous

Note, Federal Benefit Disbursement: Reasserting Separation of Powers, 97 Harv.L.Rev. 792 (1984)	23, 25
H.R. Rep. No. 92-1605, 92nd Cong., 2nd Sess. (1972)	13
H.R. Rep. No. 728, 76th Cong., 1st Sess. (1939)	18
S. Rep. No. 404, 89th Cong., 1st Sess., (1965)	9, 13

No. 85-225

IN THE

Supreme Court of the United States

OCTOBER TERM 1985

MARGARET M. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES, et al.,

Petitioners

v.

MICHIGAN ACADEMY OF FAMILY PHYSICIANS, et al.,

Respondents

On Writ of Certiorari to the
United States Court of Appeals
For the Sixth Circuit

BRIEF AMICUS CURIAE OF THE AMERICAN MEDICAL ASSOCIATION IN SUPPORT OF RESPONDENTS

INTEREST OF AMICUS CURIAE

The American Medical Association ("AMA") offers this brief as amicus curiae in support of respondents.[1] Founded in 1846, the AMA is a private, voluntary nonprofit organization of physicians. Its purpose has always been to promote the science and art of medicine and to improve the public health. Its membership exceeds 234,700 physicians and medical students.

Respondents have alleged that the Medicare Act has been violated by 42 C.F.R. §405.504, a regulation of the Secretary of Health and Human Services ("the Secretary") under Part B of the Act. The Secretary takes the position that no court is empowered even to consider respondents' challenge to the regulation. Thus, this case raises the question of whether an association of physicians can obtain judicial review of an across-the-board regulation involving Part B of Medicare.

The AMA has a direct and substantial interest in this question. Specifically, it is most concerned that the federal courts will be available to review the lawfulness of Medicare regulations which may affect access to or quality of medical care. If the courts are not open, the statutory and other legal guaranties which have until now generally protected the rights of physicians and their patients under the Medicare program will be illusory and unenforceable.[2]

STATEMENT OF THE CASE

Invoking 28 U.S.C. §1331, respondents filed this action in the United States District Court for the Eastern District of

---

[1]Pursuant to Rule 36 of the Rules of this Court, the parties have consented to the filing of this brief. Their letters of consent are set forth in the Appendix to this brief.

[2]This case does not concern any claims for individual benefits under part B of Medicare. The AMA does not dispute that such claims can properly be excluded from the federal courts.

spondents' challenge to the lawfulness of 42 C.F.R. §405.504. Section 1395ff precludes judicial review only of an individualized "determination of the amount of benefits" under part B. This case does not involve an individualized amount determination. Indeed, it does not constitute a specific claim for benefits at all.

Rather, this action is a challenge to the Secretary's statutory authority to promulgate a regulation of sweeping applicability. Nothing in the language or legislative history suggests that §1395ff is meant to preclude such a challenge. In fact, this Court has itself exercised jurisdiction over a similarly broad challenge to a procedure under Part B of Medicare. *Schweiker* v. *McClure*, 456 U.S. 188 (1982).

Second, §405(h), as incorporated into the Medicare Act by 42 U.S.C. §1395ii, does not preclude jurisdiction over this action. The second sentence of §405(h) bars direct review of findings of fact or decisions made by the Secretary after a hearing. It does not apply to the challenged regulation because that regulation was not issued after a hearing by the Secretary. In fact, Part B of Medicare does not provide for any hearing by the Secretary.

The third sentence of §405(h) also does not preclude jurisdiction over this action. By its terms, the third sentence bars only those actions in which a plaintiff seeks to "recover" on a "claim" for benefits. Respondents in this case seek neither to "recover" on a "claim" for benefits nor to obtain a ruling that is tantamount to such a result.

In any event, the third sentence of §405(h) has never been applied by this Court to preclude federal court jurisdiction under §1331 where there was no alternative route to judicial review. The government acknowledges that respondents have no such alternative route here. Since §405(h) applies to Medicare only "as applicable" under 42 U.S.C. §1395ii, it should not be made applicable to bar this action under 28 U.S.C. §1331 where no alternative route to review exists.

B.

To the extent that §§1395ff and 405(h) are applied to preclude judicial review of the lawfulness of 42 C.F.R. §405.504, they are unconstitutional for two reasons. First, their application in this case would violate the due process clause of the Fifth Amendment. That clause requires judicial review where, as here, (1) important interests are at stake, (2) there is a substantial likelihood that judicial review will be able to redress erroneous administrative action, and (3) such review will not produce a significant administrative or judicial burden. *See*, *Mathews* v. *Eldridge*, 424 U.S. 319 (1976).

Second, the application of §§1395ff and 405(h) to preclude judicial review of this case would violate the doctrine of Separation of Powers embodied in the Constitution. To the extent that these statutes are invoked to prevent the judiciary from enforcing the Secretary's adherence to his statutory mandate, they effectively create an open-ended delegation of legislative power to the Executive Branch. The Constitution does not permit this result.

ARGUMENT

I. THE MEDICARE ACT DOES NOT FORECLOSE JUDICIAL CONSIDERATION OF RESPONDENTS' CHALLENGE TO THE SECRETARY'S STATUTORY AND CONSTITUTIONAL AUTHORITY TO PROMULGATE A REGULATION UNDER PART B OF MEDICARE

The government argues that the courts have no jurisdiction under 28 U.S.C. §1331 to hear respondents' challenge to 42 C.F.R. §405.504. The government does not suggest any alternative route by which respondents may obtain judicial review of the statutory and constitutional validity of this regulation. Instead, it effectively concedes that there is none.[3]

[3]The supposed preclusion of judicial review extents to state courts. It is the government's position that §405(h) precludes review of §405.504 by "any tribunal." (Pet. Brief, at 34). Similarly, the implied preclusion advocated by the government under §1395ff would extend to all courts.

This Court has long held, however, that there is an exceedingly strong presumption against construing any statute so as to preclude judicial review. "[O]nly upon a showing of 'clear and convincing evidence' of a contrary legislative intent should the courts restrict access to judicial review." *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 141 (1967). *Accord*, *Dunlop* v. *Bachowski*, 421 U.S. 560, 567 (1975) (there is a "strong presumption that Congress did not mean to prohibit all judicial review" of decisions by the Secretary of Labor).

Thus, this Court will not lightly infer that "Congress does not intend judicial protection of rights it confers against agency action taken in excess of delegated powers." *Leedom* v. *Kyne*, 358 U.S. 184, 190 (1958). Indeed, for Congress to withhold judicial consideration of such issues would be "extraordinary" and would raise a "serious constitutional question of the validity of the statute as so construed." *Weinberger* v. *Salfi*, 422 U.S. 749, 762 (1975). *Accord*, *Johnson* v. *Robison*, 415 U.S. 361, 366-67 (1974). *Cf. Northern Pipeline Co.* v. *Marathon Pipe Line Co.*, 450 U.S. 50, 69-70 n.13 (1982) (plurality opinion). In light of the fundamental presumption in favor of judicial review, the Secretary's statutory arguments must fail.

A. Jurisdiction Is Not Impliedly Precluded By 42 U.S.C. §1395ff

1. This Court's Decision In The Erika Case Does Not Support Implied Preclusion Under §1395ff

Initially, the government argues that 42 U.S.C §1395ff forecloses judicial review of §405.504. Section 1395ff does not expressly preclude judicial review. It simply provides a review procedure for "determination of the amount of benefits under Part A" of Medicare. 42 U.S.C. §1395ff(a). In *United States* v. *Erika, Inc.*, 456 U.S. 201 (1982), however, this Court held that

the absence of an analogous provision for "determination of the amount of benefits" under Part B constitutes "persuasive evidence that Congress deliberately intended to foreclose further review of such claims." *Id.* at 208.

The government argues that *Erika* directly controls this case (Pet. Brief, at 30). Unlike this case, however, *Erika* concerned only an individual claim for specific benefits. Its holding is inapplicable to this general challenge to the validity of a regulation.

The plaintiff in *Erika*, a distributor of kidney dialysis supplies, was dissatisfied with the amount of reimbursement under Part B that it had received from its local Medicare carrier. *Id.* at 204-05. After unsuccessfully seeking review by the carrier of its claim for benefits, the distributor filed an action in federal court seeking additional payment. The case ultimately reached the Supreme Court on the issue of jurisdiction.

This Court carefully defined the question as whether the district court had "jurisdiction to review determinations by private insurance carriers of the *amount of benefits* payable under Part B of the Medicare statute." 456 U.S. at 202 (emphasis supplied). The Court answered this question in the negative. It held that the Medicare statute does not authorize review of "adverse hearing officer determinations of the amount of Part B benefits." *Id.* at 206.

Neither the holding nor the reasoning of *Erika* applies here. First, this case does not involve a determination of the amount of benefits payable to a claimant or a review of the amount of a specific Part B award. Respondents do not seek any past or prospective reimbursement. Nor do they seek that any "amount" be specifically "determined." Rather, they challenge the substantive validity of sweeping regulatory action generally authorizing

separate prevailing charge screens.[4] Accordingly, the narrow holding of *Erika* regarding individual determinations of the amount of benefits is inapplicable to this case. *See*, *Hatcher* v. *Heckler*, 772 F.2d 427, 430 (8th Cir. 1985) (holding that *Erika* and §1395ff do "not preclude judicial review of Part B claims where they go beyond mere disputes over amounts owed"); *College of American Pathologists* v. *Heckler*, 734 F.2d 859, 862-63 (D.C. Cir. 1984); *National Association of Patients on Hemodialysis* v. *Heckler*, 588 F.Supp. 1108, 1116 (D.D.C. 1984).

Second, the statutory language of §1395ff, which was the starting point for the Court's analysis in *Erika*, provides no support for an implied preclusion of respondents' challenge. The language of §1395ff does imply preclusion of specific part B amount determinations by its reference to a "determination of the amount of benefits under part A." In stark contrast, §1395ff contains no reference whatsoever to actions regarding the broad regulatory framework adopted by the Secretary. In the absence of such a reference, no basis for preclusion can be implied.

---

[4]Unlike the present action, *Erika* did not involve a challenge to the lawfulness of any regulation or other generalized policy of the Secretary. The substantive dispute in *Erika* was whether the local carrier had properly applied the Secretary's admittedly permissible "prevailing charge" definition in calculating the distributor's "reasonable charge" under Medicare. *Erika*, *supra*, 456 U.S. at 204 n. 2. This disputed application had no significance with respect to anyone except the complaining distributor because the distributor "was virtually the only provider of dialysis supplies within [the carrier's] locality." *Id.*

Even as to the distributor, the materiality of the disputed application was unclear since the carrier was not bound by any "prevailing charge" calculation but retained flexibility to consider "[o]ther factors that may be found necessary and appropriate with respect to a specific item or service to use in judging whether the charge is inherently reasonable." 20 C.F.R. §405.502(a)(4). Moreover, the government is mistaken in claiming that plaintiff in *Erika* challenged instructions issued by the Secretary. (Pet. Brief, at 32). The plaintiff in *Erika* questioned only whether any such instructions were in effect. The Court of Appeals found that none were. *Erika, Inc.* v. *United States*, 634 F.2d 580, 590 (Ct. Cl. 1980).

Third, nothing in the legislative history of §1395ff suggests that Congress intended to preclude broad challenges to the lawfulness of regulations adopted by the Secretary. To the contrary, that history demonstrates that the concern of Congress was to preclude review of individual *amount* determinations under Part B. *Erika*, *supra*, 456 U.S. at 209 n.11. "[P]ayments under the Part B program generally were expected to be smaller than those under the primary Part A program." Congress wanted " 'to avoid overloading the courts with quite minor matters' " regarding trivial adjustments to already small amounts. *Id.* at 208-09 (quoting remarks of Senator Bennett, 118 Cong. Rec. 33992 (1972)).

A challenge to the Secretary's authority to promulgate a regulation of general applicability can hardly be characterized as a minor matter. As the D.C. Circuit has observed:

> "The legislative history cited in *Erika* only reveals an intent to preclude review of Part B *amount* determinations. . . . Accordingly, we reject the Secretary's argument that Congress intended to preclude judicial review of the regulations challenged here."

College of American Pathologists, *supra*, 734 F.2d at 863 (emphasis in original). *Accord*, *National Association of Patients on Hemodialysis*, *supra*, 588 F.Supp. at 1116. Indeed, it would be wholly incongruous to impute such a judgment to the same Congress that considered an individual benefit amount determination under Part A worthy of judicial review. 42 U.S.C. 1395ff.[5]

---

[5]The government also cites *Heckler* v. *Ringer*, 466 U.S. 602 (1984), in support of its argument that §1395ff bars constitutional and statutory claims regarding the lawfulness of regulations under Part B. As discussed below, pp. 16-17, *infra*, *Ringer* is inapposite because, unlike the present case, it involved a claim for benefits. In any event, the scope of §1395ff was neither at issue nor decided in *Ringer* because the respondents did not press their claims for Part B benefits. This Court viewed *Ringer* "as involving only respondents' Part A claims." 80 L.Ed. 2d at 632 n. 4.

2. The Government's Attempt To Expand The Preclusive Effect Of §1395ff Is Without Merit

The government argues that §1395ff precludes review not only of a particular "determination of the amount of benefits" but of any matter "*bearing* on the calculation of the amount of benefits under Part B." (Pet. Brief, at 25). Neither the language nor the legislative history of §1395ff supports this expansive standard. In fact, this Court's application of §1395ff directly undercuts the government's position.

As this Court has observed, the language of the statute is the "lodestar" for any determination of the preclusive effect of §1395ff. *Erika*, *supra*, 456 U.S. at 206. The relevant language refers only to a "determination of the amount of benefits." It does not extend to matters which might have a "bearing on the calculation of the amount of benefits under Part B" (Pet. Brief, at 25). Thus, the preclusion standard advocated by the government lacks any foundation in the language of §1395ff.

Second, the legislative history does not demonstrate any Congressional intent to adopt a broadened scope of preclusion under §1395ff. The government bases its argument that judicial review of all determinations "bearing on" or "concerning" the amount of benefits under Part B is precluded by §1395ff on a single sentence contained in S. Rep. No. 404, 89th Cong., 1st Sess., 54-55 (1965):

> "Under the supplementary plan [Part B] carriers, not the Secretary, would review beneficiary complaints regarding the amount of benefits, and the bill does not provide for judicial review of a determination concerning the amount of benefits under Part B where claims will probably be for substantially smaller amounts than under Part A."

While this Report does use the word "concerning," it is clear from the context that the word is not used as a synonym for

"affecting." It is used instead as a synonym for "of" or "about." This interpretation is confirmed by the fact that the statute uses the word "of" rather than "concerning," *i.e.*, "determination *of* the amount of benefits." 42 U.S.C. 1395ff(a).

The observation of the D.C. Circuit is most accurate:

> "Nor does the Secretary direct our attention to, or claim the existence of, anything evincing the requisite congressional intent. Instead, the Secretary papers over this critical deficiency by arguing that since both *Erika* and this case may ultimately affect part B payments, the availability of judicial review should be the same in both situations. Yet, the Secretary points to no supporting legislative history for her position."

College of American Pathologists, *supra*, 734 F.2d 859 at 863. The legislative history simply does not indicate that Congress ever considered effecting a preclusion as broad as the government now advocates.

Finally, the government's attempt to read § 1395ff to preclude judicial review of any matter "bearing on" Part B benefits is directly contradicted by the decision of this Court in *Schweiker* v. *McClure*, 456 U.S. 188 (1982). In *McClure*, three Medicare beneficiaries who had been denied full reimbursement on their Part B claims brought an action claiming that their awards were inadequate. They challenged on due process grounds the alleged lack of impartiality of the carrier's hearing officers.

This challenge certainly "concerned" the amount of benefits received by the plaintiffs. Moreover, it was possible to characterize plaintiffs' claims as " 'motivated in part by a desire for increased payment.' " *See*, Pet. Brief, at 9. Yet this Court exercised jurisdiction over these claims—on the same day as it decided *Erika*. Under the government's "bearing on" standard, the exercise of jurisdiction would have been improper. In short, there is

absolutely no basis for the Secretary's effort to expand the preclusive effect of §1395ff.[6]

B. Jurisdiction Is Not Explicitly Precluded By 42 U.S.C. §405(h) As Made Applicable To Medicare By 42 U.S.C. §1395ii

The government also contends that 42 U.S.C. §405(h), as made applicable to the Medicare program by 42 U.S.C. §1395ii, precludes jurisdiction of respondents' statutory and constitutional challenge to §405.504. The government suggests that the second and the third sentence of §405(h) each independently accomplishes this result. Neither of these sentences, however, bars the assertion of jurisdiction pursuant to 28 U.S.C. §1331.

1. The Second Sentence Of §405(h) Does Not Bar Jurisdiction Here

Initially, the government relies on the second sentence of §405(h). Pet. Brief, at 34. That sentence must be read in conjunction with the first sentence of §405(h). The precise language of the two sentences is as follows:

> "The findings and decisions of the Secretary *after a hearing* shall be binding upon all individuals who were parties to such hearing. No findings of fact or decision of the Secretary shall be reviewed by any person, tribunal, or governmental agency except as herein provided." (emphasis supplied)

Read in context, the "findings of fact or decision" referred to in the second sentence of §405(h) clearly are those made by the Secretary "after a hearing."

---

[6]The Secretary also argues that the explicit preclusion of review of the Secretary's "establishment of diagnosis related groups [and] of the methodology for the classification of discharges within such groups," 42 U.S.C. §1395ww(d)(7)(B), somehow indicates a similar Congressional intent regarding prevailing charge regulations. Pet. Brief, at 27-28. All that the adoption of §1395ww(d)(7)(B) demonstrates, however, is that Congress speaks directly and clearly when it wishes to preclude review of regulations adopted by the Secretary. The absence of any similarly clear pronouncement regarding general regulations under Part B of Medicare thus indicates the absence of any Congressional intent to achieve such a result.

There has not been any "hearing" before the Secretary in connection with the issues involved in this action. Indeed, no such hearing is available. The only administrative hearing of any sort available under Part B of Medicare is that provided by 42 U.S.C. §1395u(b)(3)(C). That hearing is before a Medicare carrier—not the Secretary.

The government attempts to equate a hearing by the carrier with a hearing by the Secretary (Pet. Brief, at 34). It would thereby read §405(h) as if it referred to "findings and decisions of the [carrier] after a hearing." But the legislative history clearly reveals that Congress considered hearings before the Secretary and hearings before the carriers to be two different things. It drafted the statute with an eye to this distinction.

As stated in the Senate Report on the original Medicare Act (S. Rep. No. 404, 89th Cong., lst Sess., 54-55 (1965):

> "Under the supplementary plan [Part B] *carriers, not the Secretary*, would review beneficiary complaints regarding the amount of benefits . . ." (emphasis supplied)

See also H. R. Rep. No. 92-1605, 92nd Cong., 2nd Sess., 61 (1972) (stating that "there is no authorization for an appeal *to the Secretary*" from carrier determinations "on matters solely involving amount of benefits under Part B") (emphasis supplied). Thus, "[b]y its own terms, §405(h) is inapplicable to this [part B] case, which involves no findings of fact nor any decision by the Secretary on a claim for benefits." *National Association of Patients on Hemodialysis*, *supra*, 588 F.Supp. at 1117. *Accord*, *Colonial Penn Ins. Co.* v. *Heckler*, 721 F.2d 431, 439 (3rd Cir. 1983).[7]

[7]Moreover, the Secretary regards the two kinds of hearings as very different. The Carrier's Manual compiled by the Secretary prevents the carriers from even rendering a "decision" regarding the lawfulness of a regulation promulgated by the Secretary. Section 12016 of the Manual prohibits use of "hearing decisions as a vehicle for commenting upon the legality, constitutional or otherwise, of any provision of the act or regulations relevant to the Medicare Program."

The limited scope of the second sentence of § 405(h) is explained by the critical difference between hearings before the carrier and those before the Secretary. In particular, a route of review from hearings by the Secretary lies through 42 U.S.C. § 405(g) as incorporated into Medicare by 42 U.S.C. §1395ii. Therefore, the second sentence of §405(h) merely operates as a requirement of administrative exhaustion. *See, Heckler* v. *Ringer*, *supra*, 466 U.S. 602; *Weinberger* v. *Salfi*, 422 U.S. 749, 757 (1975). By contrast, no such review of carrier hearings under Part B is available through § 405(g). Not surprisingly, the Secretary is unable to cite a single case in which the second sentence of § 405(h) has been applied to bar a general challenge to a regulation under part B.

2. The Third Sentence Of § 405(h) Does Not Bar Jurisdiction Here

Alternatively, the government relies upon the third sentence of § 405(h) as a bar to judicial review of respondents' statutory and constitutional challenge. That sentence is inapplicable for two reasons. First, the third sentence bars only those actions brought "to *recover* on any *claim* arising under this subchapter." 42 U.S.C. § 405(h) (emphasis supplied). Respondents in this case do not seek "to recover" on any "claim" or to achieve a result that is tantamount to recovery on a claim.

Second, § 405(h) does not apply directly to Medicare. Instead, under 42 U.S.C. § 1395ii, it is incorporated into Medicare only "as applicable." The third sentence of § 405(h) is not applicable to Medicare to the extent that it would bar challenges under § 1331 to the lawfulness of the Secretary's regulations in the absence of any alternative route to judicial review.

a.

The language "to recover on any claim" as used in the third sentence of § 405(h) suggests an action brought to establish an in-

dividual's entitlement, either past or prospective, to specific reimbursement. *See National Association of Patients On Hemodialysis*, *supra*, 588 F.Supp. at 1116-1118. Respondents brought this action seeking only to invalidate the maintenance of separate prevailing charge screens. They have not sought a specific amount of reimbursement or even a ruling that will entitle them to a specific amount. Therefore, their action is not of the sort to which the language of the third sentence of §405(h) applies.

The mere fact that an action may tangentially affect reimbursement amounts does not suffice to make it a "claim" within the meaning of 42 U.S.C. §405(h). *See*, *Bio-Medical Applications of Providence, Inc.* v. *Heckler*, 593 F.Supp. 1233, 1236 (D.D.C. 1984) ("If defendants' argument were to be accepted, it would mean that any procedural dispute which had even the most tangential affect on reimbursement amounts would be precluded from judicial review, thus in effect exempting the entire Medicare area from the provisions of the APA"). Instead, the "claim" referred to in the third sentence of §405(h) is a claim for payment of an entire amount of benefits, *i.e.*, of the sort which can and must be presented to the Secretary. *See Heckler* v. *Ringer*, *supra*, 466 U.S. 602, 80 L.Ed.2d at 636-37, 640 (indicating that a "claim" can either be for "immediate payment of benefits" or "to establish a right to future payment"); *Mathews* v. *Eldridge*, 424 U.S. 319, 326-329 (1976).

Challenges which might merely affect benefits cannot be presented in isolation to the Secretary because they do not constitute the requisite full "claim for payment." *See Colonial Penn Ins. Co.*, *supra*, 721 F.2d at 438. *Cf.* 42 U.S.C. §1395u(b)(3)(C) (carrier hearings must be directed at requests for payment). Accordingly, such partial challenges, unaccompanied by any request for payment of the benefit amount or to establish a right to such payment, do not constitute "claims" for purposes of §405(h).

Even if respondents' broad regulatory challenge could somehow be characterized as a "claim" under §405(h), this ac-

tion is not one "to recover" anything. If respondents ultimately prevail, they will be entitled only to a reformulation of the current prevailing charge screen system. The construction and level of the new screen remain within the Secretary's lawful discretion. See Pet. App. 14a-15a.

Thus, as the Court of Appeals concluded, "[w]hile the eventual result of this suit *may* cause an increase in amounts of reimbursement, *that does not necessarily follow.*" Pet. App. 8a (emphasis supplied). On the contrary, "a reduction in reimbursement could occur." *Id.* It is not possible to characterize such a result as a "recovery" on a "claim" without resorting to "a nihilistic view of linguistic interpretation [which] . . . hardly provides an adequate basis for statutory construction." *Lindahl* v. *Office of Personnel Management*, U.S. , 105 S.Ct. 1620, 53 U.S.L.W. 4371, 4379 (1985) (White, J., dissenting.)

For these reasons, the wording of the third sentence of §405(h) demonstrates the inapplicability of that provision. The government, however, attempts to sidestep this language by purporting to find authority for its position in this Court's decision in *Ringer*. Specifically, the government first labels respondents' challenge as "procedural" and then argues that *Ringer* bars all "procedural" challenges "arising under" the Social Security Act (Pet. Brief, at 36-37).

Ringer stands for no such sweeping proposition. That case involved nothing more than four claims for reimbursement for a particular surgical procedure. Three of these claims were retroactive. One was prospective.

This Court recognized that if the relief requested in *Ringer* were granted, "only essentially ministerial details will remain before respondents would receive reimbursement." 80 L.Ed.2d at 636. It stated:

> "We agree with the District Court, however, that those claims are inextricably intertwined with respondents' claims

> for benefits. Indeed the relief that respondents seek to redress their supposed 'procedural' objections is the invalidation of the Secretary's current policy and a 'substantive' declaration from her that the expenses of BCBR surgery are reimbursable under the Medicare Act."

Id. at 635. Thus, contrary to the government's position, *Ringer* did not hold that all procedural challenges to Medicare regulations are barred by §405(h). It held only that those procedural challenges which are tantamount to a claim for benefits are so barred.[8]

Any other holding would have conflicted with both the "to recover" language of §405(h) and with the decision of this Court in *Schweiker* v. *McClure*, 456 U.S. 188 (1982). There, the Court exercised jurisdiction under 28 U.S.C. §1331 over a purely procedural challenge which was entirely collateral to any claim for benefits. *Cf. Mathews* v. *Eldridge*, 424 U.S. 319, 330 (1976) (recognizing that some procedural claims can be entirely collateral to a substantive claim of entitlement).

This case is very different from *Ringer*. It does not involve a challenge "inextricably intertwined" with individuals' claims to recover benefits. Rather, it is similar to *McClure* in that no claim for benefits has been made and no substantive "recovery" is necessarily entailed. In summary, neither the language of the third sentence of §405(h) nor this Court's decisions provide any support for applying that sentence to preclude the exercise of jurisdiction in this case.

b.

There is another reason that the third sentence of §405(h) does not foreclose jurisdiction in this case. Section 405(h) does not

[8] *Weinberger* v. *Salfi*, 422 U.S. 749 (1975), similarly involved a claim to recover benefits. The named plaintiffs explicitly sought recovery of "the amount of benefits to which plaintiffs became entitled." *Id.* at 755.

apply directly to Medicare. It is incorporated into Medicare by 42 U.S.C. §1395ii only "as applicable." "[A] statute incorporated into another 'as applicable' will be read in such a manner as will give form and effect to the statute into which it is incorporated." *St. Louis University* v. *Blue Cross Hospital Service,* 537 F.2d 283, 292 (8th Cir.), *cert. denied,* 429 U.S. 977 (1976).

As enacted as part of Title II of the Social Security Act, §405(h) does not, and was never intended to, cut off judicial review of the lawfulness of the Secretary's regulations. *See* H.R. Rep. No. 728, 76th Cong. lst Sess. at 43-44 (1939). Rather, 405(h) merely reroutes such challenges through §405(g). *See Weinberger* v. *Salfi,* 422 U.S. 749, 762-63 (1975). Similarly, as applied to Medicare through §1395ii, §405(h) should be deemed applicable only to the extent that it leaves intact some route for obtaining judicial review of challenges to the lawfulness of the Secretary's regulations.

Because 28 U.S.C. §1331 provides the only available path to judicial review here, its assertion as a predicate for jurisdiction should not be precluded by §405(h). Rather, as applied to this case, that section should be deemed incorporated by §1395ii *mutatis mutandis.* As one court has noted, "Congress, by incorporating section 405(h) into the Medicare Act to the extent applicable, did not intend to preclude judicial review of claims for which no alternative form of judicial review was available." *National Association of Home Health Agencies* v. *Schweiker,* 690 F.2d 932, 941 (D.C. Cir. 1982), *cert. denied,* 459 U.S. 1204 (1983).

The government completely ignores the crucial fact that §405(h) does not apply directly to Medicare. Instead, it relies almost exclusively on this Court's decisions in *Heckler* v. *Ringer,* 466 U.S. 602 (1984), and *Weinberger* v. *Salfi,* 422 U.S. 749 (1975). Those decisions differ fundamentally from the present case, however, in that the application of §405(h) left plaintiffs in those cases with a route to judicial review.

All the plaintiffs in *Ringer,* including the one who had not yet undergone surgery, had the ability eventually to have their claims brought for review before a court. In fact, the *Ringer* decision was predicated on not permitting the plaintiffs to circumvent the Medicare Act's carefully crafted route to judicial review. This Court concluded that "all aspects of respondents' claims for benefits should be channeled first into the administrative process which Congress has provided for the determination of claims for benefits." 80 L.Ed.2d at 635.

Similarly, when applying §405(h) in *Salfi,* this Court emphasized that the statutory scheme of Title II does not foreclose all judicial review but simply requires that actions "be brought under jurisdictional grants contained in the Act." 422 U.S. at 762. Those alternative jurisdictional grants ultimately allowed for review in *Salfi.* Indeed, the Court remarked that the elimination of all judicial consideration would have been so "extraordinary," that " 'clear and convincing' evidence would be required before we ascribe such intent to Congress." *Id.*

In contrast to *Ringer* and *Salfi,* respondents here have no route to judicial review if jurisdiction under §1331 is foreclosed. 42 U.S.C. §1395ii provides the flexibility to take into account this difference. Accordingly, in order to avoid the constitutional problems touched upon in *Salfi* and discussed at length below, §405(h) should not be deemed incorporated into §1395ii so as to preclude judicial review of respondents' statutory and constitutional challenge to the Secretary's regulation.

II. JUDICIAL REVIEW OF RESPONDENTS' CHALLENGE TO THE SECRETARY'S REGULATION IS REQUIRED BY THE CONSTITUTION

As detailed above, §§1395ff and 405(h) do not bar the assertion of jurisdiction in this case pursuant to 28 U.S.C. §1331. However, to the extent that they do, they are unconstitutional. Specifically,

their application in the circumstances of this case violates due process requirements and the constitutional doctrine of Separation of Powers.[9]

A. Due Process Requires Judicial Review Of Respondents' Challenge To The Secretary's Regulation.

This Court has recognized that the requirements of due process apply to Medicare. *Schweiker* v. *McClure,* 456 U.S. 188 (1982). *Cf. Weinberger* v. *Salfi,* 422 U.S. 749, 768-69 (1975). It has also recognized that "under certain circumstances, the constitutional requirement of due process is a requirement of judicial process." *Crowell* v. *Benson,* 285 U.S. 22, 87 (1932) (Brandeis, J., dissenting). *Cf. Northern Pipelines Co.* v. *Marathon Pipe Line Co.,* 458 U.S. 50, 69-70 n. 23 (1982) (plurality opinion) ("when Congress assigns these matters to administrative agencies . . . it has generally provided, and we have suggested that it may be required to provide, for Art. III judicial review"). Respondents' challenge to the Secretary's authority to promulgate a sweeping regulation is a circumstance in which judicial process is constitutionally required.

This conclusion is dictated by the three factors which this Court has identified as relevant in determining "the specific dictates of due process" in the context of an administrative program:

> "First, the private interest that will be affected by the official action; second, the risks of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail."

---

[9]This Court has noted but not decided the question of the constitutionality of the preclusion of judicial review by §§1395ff and 405(h). *Erika, supra,* 456 U.S. at 211 n.14.

Mathews v. *Eldridge*, 424 U.S. 319, 335 (1976). *Accord*, *McClure*, *supra*, 456 U.S. at 193-94. Application of these factors demonstrates the appropriateness of judicial review in this case.

First, the interests implicated by the Secretary's promulgation of the challenged regulation are substantial. This Court has previously assumed that private interests in Part B payments are " 'considerable,' though 'not quite as precious as the right to receive welfare or social security benefits.' " *McClure*, *supra*, 456 U.S. at 198. In any event, as the district court found, the regulation challenged here "tends to influence the patient's choice of a physician" (Pet. App. 30a). And a patient's choice of physician is a matter of fundamental importance. *See*, *Doe* v. *Bolton*, 410 U.S. 179, 219-220 (1973) (Douglas, J., concurring) (discussing Fourteenth Amendment protection of right "to seek out a physician of one's choice"). *See also*, 42 U.S.C. §1395a (freedom of choice of physician guaranteed by Medicare Act).

More than private interests are implicated by this case. The question of whether the Secretary has exceeded delegated authority in promulgating a regulation implicates public interests of the most fundamental sort. Thus, both public and private interests of major importance are at stake here.

Second, there is a substantial likelihood that judicial review will be of value in correcting any erroneous legal assessment by the Secretary embodied in the challenged regulation. Judicial review will enable the courts to determine whether the challenged regulation accords with the requirements of 42 U.S.C. §1395u(b)(3) and of the constitution. Courts have always been considered the superior adjudicators of such legal questions. " '[W]here the only or principal dispute relates to the meaning of the statutory term' . . . the controversy presents issues on which courts, and not [administrators], are relatively more expert." *Barlow* v. *Collins*, 397 U.S. 159, 166 (1970), quoting *Hardin* v. *Kentucky Utilities Co.*, 340 U.S. 1, 14 (Harlan, J., dissenting).

See Califano v. *Sanders*, 430 U.S. 99, 109 (1977); *Wayne State Univ.* v. *Cleland*, 590 F.2d 627, 631-32 (6th Cir. 1978).

To be sure, an agency's interpretations of statutory provisions have always been given judicial consideration. *See, e.g., NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 274-75 (1974). An agency has never been thought to possess such expertise, however, as to justify abdication of judicial oversight. *See, Skidmore* v. *Swift & Co.*, 323 U.S. 134, 140 (1944); *National Ass'n of Home Health Agencies*, *supra*, 690 F.2d at 940-41 (finding that review of actions implementing Medicare Act did not intrude upon area of agency expertise). Accordingly, judicial review of respondents' facial challenge to the lawfulness of the Secretary's regulation is warranted because it significantly increases the probability of correcting any error. Indeed, both the district court and the Court of Appeals concluded that such an error had been made. *See*, pp. 2-3, *supra*.

For due process purposes, respondents' challenge to §405.504 must be contrasted with a challenge to the Secretary's application of valid statutory and regulatory standards to a particular set of facts in order to make a factual determination as to the "amount of benefits" due an individual. The latter case involves issues within the sphere of administrative expertise. Courts are not particularly well suited to make such specialized factual determinations. Consequently, there is a substantially diminished likelihood that judicial review would serve to correct any administrative error. *Cf. Schweiker* v. *McClure*, 456 U.S. 188, 198-200 (1982) (holding that due process does not require review of benefit determinations).

The lack of any judicial review for individualized claims of erroneous factual determinations may thus be consonant with due process. That, however, is not the nature of the claim here. Respondents' challenge is not based on individualized factual determinations. It is predicated on the Secretary's lack of authority to promulgate a regulation.

Finally, no substantial costs would be imposed by a requirement of judicial review of actions which challenge the Secretary's statutory and constitutional authority to promulgate a regulation of general applicability. Such actions do not threaten to flood the federal courts with review of individual benefit determinations. On the contrary, a holding that due process requires the exercise of jurisdiction here will apply only to the small number of cases in which there is a colorable challenge to the lawfulness of a regulation and in which there is no alternative route to judicial review.

It is both desirable and cost-effective to resolve questions of broad applicability and repeated relevance in a single judicial proceeding. *Cf. Johnson* v. *Robison*, 415 U.S. 361, 373 (1974) (finding that constitutional challenges to veterans' benefits legislation "cannot be expected to burden the courts by their volume"). As one recent commentator has concluded, "permitting review only when plaintiffs argue that a particular statutory or administrative standard is itself invalid would not result in a costly flood of litigation, because the validity of a standard can be readily established, at times even in a single case." Note, *Congressional Preclusion of Judicial Review of Federal Benefit Disbursement: Reasserting Separation of Powers*, 97 Harv.L. Rev. 792 (1984).

In short, the interests at issue here are important. There is a substantial likelihood that the judiciary will be able to redress any erroneous determination of those interests. Moreover, the exercise of jurisdiction does not threaten to inundate the courts or to create any other administrative burden. Accordingly, due process requires that §§ 1395ff and 405(h) be declared unconstitutional to the extent that they are applied to preclude judicial review of this case.

B. The Constitutional Scheme Of Separation Of Powers Requires Judicial Review Of Respondents' Challenge To The Secretary's Regulation

Judicial review of whether the challenged regulation exceeds the authority delegated to the Secretary under the Medicare Act

is also required by the constitutional doctrine of Separation of Powers. Without judicial review, any Congressional restriction on the exercise of authority by the Executive Branch under the Medicare Act would be illusory. As the Court of Appeals correctly noted, "[t]he Secretary apparently would have unbridled discretion to promulgate any regulation he chose." Pet.App. 10a.

This Court has required that any congressional delegation of authority provide "the recipient of that authority with an 'intelligible principle' to guide the exercise of the delegated discretion." *Industrial Union Dept.* v. *American Petrol. Inst.*, 447 U.S. 607, 686-87 (1980) (Rehnquist, J. concurring). This requirement ensures that "important choices of social policy are made by Congress." *Id.* at 685. It ensures that Congress does not abdicate its role in the constitutional scheme. Thus, an "open-ended grant" of legislative power is constitutionally defective. *Id.* at 646 (plurality opinion). *Accord*, *Schechter Poultry Corp.* v. *United States*, 295 U.S. 495, 539 (1935).

As this Court has recognized, judicial review provides "safeguards against statutory or constitutional excess." *American Power & Light Co.* v. *SEC*, 329 U.S. 90, 106 (1946). Such review is an essential element in ensuring that the Executive Branch remains bound by the limiting principles that Congress purports to provide. *See*, *e.g.*, *Immigration & Naturalization Service* v. *Chadha*, 462 U.S. 919, 953 n.16 (1983) (courts "can always . . . enforce adherence to statutory standards"); *Yakus* v. *United States*, 321 U.S. 414, 425 (1944) (the "concern of courts is to ascertain whether the will of Congress has been obeyed"). *Cf. Leedom* v. *Kyne*, 358 U.S. 184, 190-91 (1958). Indeed, absent judicial review and enforcement, it would make no difference whether or not a congressional grant of authority contained any guiding "intelligible principle." The recipient of the authority would be free to contravene any such principle with impunity.

Moreover, corrective congressional oversight in such a situation cannot be presumed. Rather, the Judicial Branch must

maintain the separation of powers between the Executive and the Legislative. As one recent commentator has concluded:

> "If separation-of-powers doctrine requires that delegation of authority be accompanied by limits—legislative or administrative—to protect against executive arbitrariness, it follows that separation-of-powers doctrine must also prohibit Congress from precluding judicial enforcement of those limits. . . . The availability of judicial review can therefore be seen as a necessary correlate of the procedural and substantive limits placed on the authority of the executive."

Note, *Congressional Preclusion of Judicial Review of Federal Benefit Disbursement: Reasserting Separation of Powers*, Harv.L.Rev. 786-787 (1984).

In sum, if, as the government contends, §§ 1395ff and 405(h) preclude all judicial review of the question of whether the Secretary exceeded his statutory power in promulgating a regulation, these sections remove the judiciary as the primary check against unlawful delegation of legislative authority to the Executive Branch. In this respect, they upset the constitutional scheme of Separation of Powers. They are therefore unconstitutional as applied.

CONCLUSION

For the reasons stated above, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

JACK R. BIERIG
DAVID F. GRAHAM
Sidley & Austin
One First National Plaza
Chicago, Illinois 60603
(312) 853-7000
Counsel for Amicus Curiae

Of Counsel:

KIRK B. JOHNSON
B. J. ANDERSON
American Medical Association
535 N. Dearborn Street
Chicago, Illinois 60610
(312) 645-5000

December 26, 1985

December 6, 1985

David F. Graham, Esquire
Sidley & Austin
One First National Plaza
Chicago, Illinois 60603

Re: *Margaret M. Heckler, Secretary of Health and Human Services,* et al. v. *Michigan Academy of Family Physicians,* et al., No. 85-225

Dear Mr. Graham:

As requested in your letter of December 4, 1985, I hereby consent to the filing of a brief amicus curiae on behalf of the American Medical Association in this case.

Sincerely,

CHARLES FRIED
Solicitor General

December 19, 1985

David F. Graham
Sidley & Austin
One First National Plaza
Chicago, Illinois 60603

Re: *Margaret M. Heckler, Secetary of Health and Human Services,* et al. vs. *Michigan Academy of Family Physicians,* et al. No. 85-225

Dear Mr. Graham:

On behalf of respondents Michigan Academy of Family Physicians, Lester Webb, Charles Farber, Glenn House and Carol A. Diedrich, I hereby consent to the filing of a brief *amicus curiae* in this case on behalf of the American Medical Association.

Very truly yours,

ALAN G. GILCHRIST